



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AUG 13 2007

Lyn Utrecht, Eric Kleinfeld, and Karen Zeglis
Ryan, Phillips, Utrecht & Mackinnon
1133 Connecticut Ave., N.W., Suite 300
Washington, D.C. 20036

RE: MUR 5815
Patricia Madrid
Madrid for Congress and Rita Longino, in
her official capacity as Treasurer

Dear Counsel:

On September 22, 2006, the Federal Election Commission notified your clients, Patricia Madrid, and Madrid for Congress and Rita Longino, in her official capacity as Treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, the Commission, on July 24, 2007, found that there is reason to believe Patricia Madrid violated 2 U.S.C. § 441a(a)(1), and Madrid for Congress and Rita Longino, in her official capacity as Treasurer, violated 2 U.S.C. §§ 441a(f) and 434(b), provisions of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office, along with answers to the enclosed questions, within 30 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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MUR 5815
Patricia Madrid, et al.
Page 2

Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

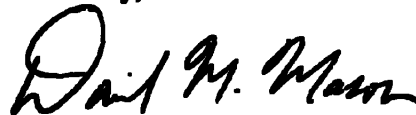
Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



David M. Mason
Vice Chairman

Enclosures
Factual and Legal Analysis
Written Questions

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**Written Questions for MUR 5815 (Patricia Madrid:
Madrid for Congress and Rita Longino, in her official capacity as Treasurer)**

- 1) Identify the vendor(s) used to produce and disseminate the mailer entitled "Meth Lab" identified in the Factual and Legal Analysis in this matter.**
- 2) Disclose all costs associated with the production and dissemination of the mailer entitled "Meth Lab" identified in the Factual and Legal Analysis in this matter.**
- (3) Describe the role of Patricia Madrid in the creation, production, or distribution of the mailer entitled "Meth Lab" identified in the Factual and Legal Analysis in this matter. State whether Ms. Madrid requested or suggested that the mailer be created, produced or distributed, or was materially involved in decisions regarding, or had substantial discussions about, pertinent aspects of the mailer. Describe all such instances in detail.**

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Madrid for Congress and Rita Longino, in
her official capacity as Treasurer

MUR: 5815

Patricia Madrid

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by the Republican Party of New Mexico alleging a violation of the Federal Election Campaign Act of 1971 ("the Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), by Madrid for Congress and Rita Longino, in her official capacity as Treasurer ("the Committee"), and Patricia Madrid.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

Patricia Madrid was the Attorney General for the State of New Mexico in 2006.¹ Ms. Madrid was also a candidate for a seat in the United States House of Representatives for New Mexico's 1st Congressional District in 2006. The complaint alleges that four mailers distributed by Ms. Madrid between June and August 2006 in her capacity as Attorney General of the State of New Mexico (the "State") "are no less than self-promotional campaign flyers, paid for by state government money, disguised as informational mailers." The complaint argues that these mailers constitute coordinated campaign expenditures, and the associated costs constitute excessive contributions by the State to Ms. Madrid's campaign committee.²

¹ Ms. Madrid was first elected Attorney General in 1998 and re-elected in 2002. Her last term in office ended in 2006.

² The complaint also alleges that, by using "payouts from lawsuits brought by the Attorney General's Office," Ms. Madrid violated a New Mexico law that prohibits public officials from using their office for personal

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In response to the complaint, Ms. Madrid and her campaign committee argue that the mailers: (1) serve a legitimate civic function and did not further Ms. Madrid's congressional campaign; (2) address sexual exploitation of minors over the Internet, the theft of personal information from veterans, the high cost of prescription medications, and the dangers of methamphetamine laboratories; (3) provide information on how the reader may receive free information directly from the State, or supplies contact information for reporting illegal activity; and (4) do not reference an election or solicit contributions, or contain express advocacy for or against any candidate.³

The four mailers at issue were paid for with funds received by the State of New Mexico in connection with lawsuits Ms. Madrid brought as Attorney General, and were distributed to residents of the State of New Mexico between June and August 2006. All of the mailers at issue were distributed after the New Mexico primary election held on June 6, 2006, with the possible exception of the mailer entitled "Veterans;" the exact mailing date of "Veterans," which was mailed at some point in June 2006, is not known at this time. The mailers are summarized as follows:

gain. This allegation does not fall within the jurisdiction of the Commission and, therefore, will not be addressed herein.

³ Ms. Madrid and the Committee also argue that there is no legal basis for treating the Attorney General's official mailings differently from those made by a member of Congress running for re-election, and that the complaint should be dismissed because the "basis for [its] conclusion is unclear and inconsistent and no specific provision or section of the Act is cited," and, therefore, it does not meet the requirements for a valid complaint under the regulations. Neither of these arguments has merit. The communications at issue fall within the scope of the Act, as amended by BCRA; congressional newsletters do not because the Federal Government is specifically exempted from the definition of "person" and such communications are, therefore, not covered by the Act. With respect to the alleged deficiency of the complaint, the Commission notes that the complaint contains facts that describe a violation of the Act, as explained below.

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1. **"Be Afraid"**

"Be Afraid" was mailed in July 2006 reportedly at a cost of \$100,011.⁴ On the front of the mailer the words "Be Afraid" appear above a picture of a young girl on a computer. See Complaint, Exhibit B. Beneath this image is a box with text inside describing a "true story" of a girl who fell victim to an Internet predator. *Id.* On the inside of the mailer written across the top are the words: "Online Predators are Exploiting Our Children ... [and beneath and in smaller font] Attorney General Patricia Madrid is taking action to keep New Mexico's children safe." *Id.* The mailer describes actions being taken by Attorney General Patricia Madrid, states that Ms. Madrid needs the readers' help to protect the children, and instructs the reader to download or request a free copy of Ms. Madrid's Internet Safety Guide for Parents and Teens and provides information regarding how to do so. *Id.* The back contains, among other things, a picture of Ms. Madrid with a statement from her about protecting New Mexico's children and teens. *Id.*

2. **"Veterans"**

"Veterans" was mailed in June 2006. The associated cost is not known at this time. "Veterans" is a mailer regarding the theft of veterans' identities. See Complaint, Exhibit D. Appearing across the top of the mailer are the words: "Attorney General Patricia Madrid Has Taken Action to Protect Veterans." *Id.* A picture of Ms. Madrid appears in the center of the mailer. *Id.* On the left side of the picture, the mailer describes steps individuals can take if they are victims of identity theft; to the right of the picture, the mailer states, among other things, that the Department of Veteran Affairs allowed the personal information of millions of veterans to be stolen. *Id.* At the bottom the reader is told to: "Get your free copy of New Mexico Attorney

⁴ According to an article attached to the complaint entitled, "AG predator mailing riles Republicans," then Attorney General Madrid stated that "thousands were printed [and] mailed out statewide at a cost of \$100,011 using money her office won prosecuting companies that defrauded New Mexicans." See Complaint, Exhibit H. The article, which was posted on the news organization's website on July 12, 2006, indicates that "Be Afraid" was disseminated during the week of July 3-7, 2006. *Id.*

General Patricia Madrid's Identity Theft Repair Kit" and is provided information about how to do so. *Id.*

3. **"Prescription Drug"**

"Prescription Drugs" was mailed in July 2006, and cost \$61,257 to produce.⁵ It is a mailer regarding the cost of prescription drugs. See Complaint, Exhibit E. The mailer states, "Attorney General Patricia Madrid Is Fighting to Keep Your Prescription Cost Down," provides information on a free Prescription Drug Pricing Guide, and offers the reader an order form for the updated guide. *Id.*

4. **"Meth Lab"**

"Meth Lab" was mailed in August 2006. The cost of this mailer is not available. "Meth Lab" contains a message from Attorney General Madrid and the President of the New Mexico Sheriff's and Police Association. See Exhibit G. The two law enforcement officials are pictured together on the front of the mailer, which alerts readers to the warning signs of a methamphetamine laboratory and provides telephone numbers to use to report a suspected lab. *Id.*

B. **Legal Analysis**

1. **Alleged Coordinated Communication**

The Act, as amended by BCRA, provides that no person shall make contributions to any candidate and his or her authorized political committee with respect to any election for federal office, which, in the aggregate, exceed \$2,100.⁶ 2 U.S.C. § 441a(a)(1)(A). Further, candidates

⁵ According to an article attached to the complaint entitled "More Mailers From AG's Office On The Way," the "Veterans" mailer cost \$61,257 to produce. Complaint, Exhibit F.

⁶ The Bipartisan Campaign Reform Act of 2002 indexed certain contribution limits for inflation. For the 2005-2006 election cycle, the limit for individual contributions to Federal candidates, indexed for inflation, was \$2,100.

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and political committees are prohibited from knowingly accepting any contributions in excess of the Act's limitations. 2 U.S.C. § 441a(f).

Ms. Madrid and the Committee claim that the \$2,100 contribution limitation does not apply to the State of New Mexico because States are not a "person" as defined by the Act. See Response of Ms. Madrid and the Committee, p. 5, footnote 17. Under the Act, "person" is defined as "an individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons," but such term does not include the Federal Government or any authority of the Federal Government. 2 U.S.C. § 431(11). As to whether the Act applies to States, the "Commission has made clear that State governments and municipal corporations are persons under the Act and are subject to its contribution provisions." See Advisory Opinion 2000-05; see also Advisory Opinion 1999-7 (although the definition of "person" in the Act exempts the federal government, "the Commission has not extended this exclusion to State governments or their instrumentalities.").⁷ See 2 U.S.C. § 431(11).

At issue is whether the mailings disseminated by Ms. Madrid in her capacity as Attorney General of the State of New Mexico were coordinated with Ms. Madrid or her campaign committee. If so, the costs of the mailers would be in-kind contributions from the State of New Mexico to the Committee that, given the cost information available at this time and the wide dissemination of the mailers, would likely exceed the contribution limitations at 2 U.S.C. § 441a(a)(1)(A).

⁷ The Commission has applied the Act to States in several enforcement matters. See, e.g., MUR 1686 (Jim Hunt Committee) (Commission found RTB that the State of North Carolina violated 2 U.S.C. § 441a(a)(1)(A) with respect to making an excessive in-kind contribution); and MUR 3986 (Wilder for President Committee) (Commission found reason to believe that the Commonwealth of Virginia violated the Act by making excessive in-kind contributions).

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A straightforward application of the coordination regulations at 11 C.F.R. § 109.21 suggests that the State of New Mexico made an in-kind contribution to the Committee in the form of a coordinated expenditure with respect to the mailer entitled "Meth Lab." The payment prong of the coordination regulation, 11 C.F.R. § 109.21(a)(1), is satisfied because the mailer was paid for by the State of New Mexico, that is, a person other than a candidate, the candidate's committee, a political party committee, or any of their agents. The content prong, 11 C.F.R. § 109.21(c), may have been satisfied because "Meth Lab" was a mass mailing, and therefore, a public communication, and the mailer contains a clearly identified federal candidate's (Ms. Madrid's) name and photograph, and may have been directed to New Mexico voters within 90 days of the November 7, 2006 General Election.⁸ Finally, there is a basis to investigate whether the conduct prong has been met because there is no dispute that the Attorney General's Office, of which Ms. Madrid was the top official, disseminated the mailer. As the top official, Ms. Madrid may have requested or suggested that the communication be created, produced or distributed, or may have been materially involved in decisions regarding, or had substantial discussions about, pertinent aspects of the communication.⁹

⁸ Current Section 109.21(c) of the Commission's regulations became effective on July 10, 2006. The regulation implements a decision of the Court of Appeals in *Shays v. FEC*, in which the court affirmed the District Court's invalidation of the fourth content standard of coordinated communications regulations the Commission promulgated in 2002. See *Shays v. FEC*, No. 04-5352 (D.C. Cir. July 15, 2005). The 2002 regulation, which remained in effect pending the Commission's promulgation of the new regulation, is satisfied if a public communication is, *inter alia*, publicly distributed or disseminated "120 days or fewer" before a primary or general election. Technically, the 2002 regulation governs two of the mailers at issue — "Veterans," and "Be Afraid," which appear to have been distributed prior to the July 10, 2006 effective date of the new regulation; however, given the Commission's conclusion during the 2006 rulemaking that a 90-day window is more appropriate for determining whether a communication involving a Congressional candidate is made for the purpose of influencing Federal elections, the Commission applied the fourth content standard, as revised in 2006, to all of the mailers at issue in this case. The mailer entitled "Veterans," which was distributed in June 2006, "Be Afraid," which was distributed in July 2006, and "Prescription Drugs," also distributed in July 2006, all fall outside of the 90-window. Thus, only one of the four mailers at issue, "Meth Lab," appears to satisfy the content prong.

⁹ Cf. Advisory Opinion 1999-11 (Dianne Byrum) (concluding that the costs of billboards located in the legislative district of a federal candidate's state office, used to advertise "weekly coffees" with her constituents, would not result in contributions or expenditures provided the communications did not expressly advocate the

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Thus, with respect to the mailer entitled "Meth Lab," the Committee may have knowingly accepted an in-kind contribution from the State of New Mexico in the form of a coordinated communication. See 11 C.F.R. § 109.21(b)(2). Consequently, the cost of this mailer appears to constitute an in-kind contribution from the State to Ms. Madrid's campaign committee. We do not have information at this time regarding the cost of producing and disseminating the "Meth Lab" mailer; however, the mailer was disseminated throughout the State, the cost of which, alone, would likely have exceeded the \$2,100 contribution limit.

Based on the foregoing, there is reason to believe that Madrid for Congress and Rita Longino, in her official capacity as Treasurer, may have violated 2 U.S.C. §§ 441a(f) and 434(b) by knowingly accepting an excessive contribution from the State of New Mexico, in the form of a coordinated expenditure, and failing to report it. In addition, Ms. Madrid may have had a direct role in making the excessive contribution because the Attorney General's Office of the State of New Mexico, of which she was the top official, disseminated the mailers. Therefore, there is reason to believe that Patricia Madrid, as a Federal candidate, may have knowingly received funds in connection with her candidacy that exceeded the applicable contribution limitation in the Act, in violation of 2 U.S.C. § 441a(a)(1).

election of the candidate or the defeat of his or her opponents and did not solicit contributions); MUR 4099 (Orloski) (finding no contribution resulting from a congressman's speech at a senior citizens picnic hosted by three corporations); see also *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). These are pre-BCRA determinations and before the promulgation of the coordination regulations at Section 109.21.